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IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA  
DIVISION I

STATE OF WEST VIRGINIA,

Plaintiff,

v.

Case No. 98-F-167

GARY DEWAYNE KENT,

Defendant.

ORDER DENYING "DEFENDANT'S MOTION FOR JUDGMENT  
OF ACQUITTAL" AND "DEFENDANT'S MOTION FOR A NEW TRIAL"

The Defendant Gary Dewayne Kent (hereinafter "the Defendant") was convicted of murder of the first degree (felony murder) by a jury of his peers on 19 March 2007, after a six (6) day trial. The defendant was represented by James B. Zimarowski, Esquire, and Joshua P. Sturm, Esquire. The State of West Virginia (hereinafter "the State") was represented by its Prosecuting Attorney, Patrick N. Wilson, and its Assistant Prosecuting Attorney, Christina A. Mulligan. Defense counsel timely filed "Defendant's Motion for Judgment of Acquittal" (hereinafter "Motion for Judgment of Acquittal") and "Defendant's Motion for a New Trial" (hereinafter "Motion for New Trial").

A brief history of this case is necessary before addressing these motions. On 01 October 1999, a Marion County jury found the Defendant guilty of murder of the first degree (deliberate and premeditated). In State v. Kent, 213 W.Va. 535 (2003) the Supreme Court of Appeals of West Virginia (hereinafter "our Supreme

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Court") reversed the conviction and remanded the matter for a new trial. As indicated above, the new trial resulted in another conviction of murder of the first degree.

The above referenced defense motions set forth five (5) grounds for appeal. They are as follows: (1) the evidence was insufficient to sustain a conviction when viewed on the record as a whole; (2) the Trial Court erred in denying the Defendant's pretrial motion to prohibit the State from seeking a conviction of murder of the first degree (felony murder) in the retrial; (3) the Trial Court erred in allowing the State to cross examine the Defendant regarding truthfulness of other witnesses and other generalized comparative testimony issues; (4) the Trial Court erred in allowing the testimony of a deceased witness to be read before the jury; and (5) the Trial Court erred in denying the Defendant's pretrial motions in limine, thereby allowing State expert witnesses to opine on shell casing evaluations and gunshot residue testing.

These post trial motions were argued on 16 May 2007. After considering the authorities cited and the arguments made, and after having reviewed the applicable law, the Court is of the opinion to deny Defendant's motions and sustain the conviction. The grounds for this ruling are as follows:

(1) Sufficiency of the evidence

In State v. Guthrie, 194 W.Va. 657 (1995), our Supreme Court

set forth the heavy burden which a criminal defendant faces in challenging the sufficiency of the evidence to support a conviction. The Defendant cannot sustain that burden. In addition to the overwhelming circumstantial evidence pointing to Defendant as the perpetrator, the Defendant chose to testify in his own behalf, against the firm advice of his counsel, and his own testimony was devastating to his case. The record in this case clearly demonstrates more than sufficient evidence to support the conviction.

(2) Trial Court's refusal to preclude "felony murder"

In the first trial of this case, the jury found the Defendant guilty of murder of the first degree (deliberate and premeditated), and defense counsel take the position that this represents a jury finding of not guilty of murder of the first degree (felony murder). This Court simply does not agree with the Defendant's "implicit acquittal" theory. In addition, the cases cited by defense counsel in support of their position are cases which enjoin a jury from finding guilt of a higher offense in the second trial, and those cases do not fit the fact pattern which presents itself herein.

(3) Cross-examination of the Defendant

The Defendant, during his testimony in direct, repeatedly made statements regarding the credibility and the character for truthfulness and/or untruthfulness of a witness who had testified

before him, including at least one who testified on his behalf during this trial. This opened the door for the State to question him regarding his basis for such assertions, as well as probing his own bias for making such assertions.

(4) Allowing the reading of the testimony of a witness who testified at the first trial and is now deceased

The witness in question testified in the first trial on behalf of the defendant. She died prior to the second trial. Clearly she was an "unavailable witness" under Rule 804(a)(4) of the West Virginia Rules of Evidence. As such, her testimony was admissible as an exception to the hearsay rule. In addition, it is the Court's recollection that the testimony was of very limited import to the issues in the trial.

(5) Allowing the State's expert witnesses to opine regarding shell casing evaluations and gun shot residue testing

The witnesses in question were presented as experts by the State. Defense counsel conducted extensive cross examination of these witnesses, both as to their expertise and their findings, during the course of the trial. The Court was aware of Rules 702 and 703 of the West Virginia Rules of Evidence, and in conjunction with same ruled the testimony admissible. And finally, the jurors were instructed to give this testimony such weight as they deemed advisable. No error exists with regard to this matter.

Accordingly, based upon all of the above, it is **ORDERED** that

"Defendant's Motion for Judgment of Acquittal" and "Motion for a New Trial" be, and the same are, hereby, DENIED.

The Circuit Clerk of Marion County is hereby directed to provide certified copies of this order to James B. Zimarowski, Esquire, at 265 High Street, Suite 200, Morgantown, West Virginia 26505; to Joshua P. Sturm, Esquire, at Post Office Box 49, Fairmont, West Virginia 26555; to Patrick N. Wilson, Prosecuting Attorney of Marion County; and Christina A. Mulligan, Assistant Prosecuting Attorney of Marion County.

ENTER 13 JUNE 2007

*Fred L. Fox, II*

FRED L. FOX, II, CIRCUIT JUDGE

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TESTE

*Robert P. Cole*  
CLERK OF THE CIRCUIT CLERK  
JUN 14 2007